

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

808

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 9807

WILLIAM S. HODGES, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

GEORGE MORRIS FAY,
United States Attorney.

JOHN C. CONLIFE,
Assistant United States Attorney.

JOHN D. LANE,
Assistant United States Attorney.

L. CLARK EWING,
Assistant United States Attorney.

*United States Court of Appeals
for the District of Columbia
Circuit*
FILED NOV 19 1948

Joseph W. Stewart

CLERK

INDEX

	Page
Counterstatement of the case.....	1
Statutes involved.....	4
Summary of argument.....	5
Argument:	
I. An Application by a Co-defendant to change his plea is addressed to the sound discretion of the court and the action of the court will not be disturbed unless there is shown an abuse of discretion.....	6
II. There was substantial evidence to sustain the verdict of the jury.....	7
Conclusion.....	12

TABLE OF CASES

<i>Calbeek v. United States</i> , 10 F. 2d 401 (C. C. A. 7th, 1925), <i>cert. denied</i> 271 U. S. 662.....	6
<i>Callahan v. United States</i> , 35 F. 2d 633 (C. C. A. 10th, 1929).....	6
<i>Caminetti v. United States</i> , 242 U. S. 470, 495 (1917).....	8
<i>Cherry v. United States</i> , 78 F. 2d 334, 336 (C. C. A. 7th, 1935).....	9
<i>Curley v. United States</i> , 81 U. S. App. D. C. 389, 160 F. 2d 229 (1947) <i>cert. granted</i> , 331 U. S. 837.....	8
<i>Egan v. United States</i> , 52 App. D. C. 384, 287 Fed. 958 (1923).....	8
<i>Glasser v. United States</i> , 315 U. S. 60, 80 (1942).....	7
<i>Hall v. United States</i> , 109 F. 2d 976, 982 (C. C. A. 10th, 1940).....	8
<i>Hardeman v. United States</i> , 82 U. S. App. D. C. 194, 163 F. 2d 21 (1947).....	8
<i>McDonnell v. United States</i> , 81 U. S. App. D. C. 123, 155 F. 2d 297 (1946).....	12
<i>Millard v. United States</i> , 148 F. 2d 154 (C. C. A. 5th, 1945) <i>cert. denied</i> 325 U. S. 885.....	6
<i>Moder v. United States</i> , 62 App. D. C. 65, 66, 64 F. 2d 703 (1933) <i>cert. denied</i> , <i>sub. nom. Caparrotta v. United States</i> 289 U. S. 739.....	11
<i>Sipe v. United States</i> , 80 U. S. App. D. C. 194, 150 F. 2d 984 (1945) <i>cert. denied</i> 326 U. S. 788.....	8
<i>Tomlinson v. United States</i> , 68 App. D. C. 106, 93 F. 2d 652 (1937).....	6
<i>United States v. Bender</i> , 60 F. 2d 56 (C. C. A. 2d, 1932) <i>cert. denied</i> , <i>sub. nom. Posner v. United States</i> , 287 U. S. 598.....	8
<i>United States v. Gallo</i> , 123 F. 2d 229, 230-231 (C. C. A. 2d, 1941).....	8
<i>United States v. Moran</i> , 151 F. 2d 661, 662 (C. C. A. 2d, 1945).....	8
<i>United States v. Riedel</i> , 126 F. 2d 81, 82 (C. C. A. 7th, 1942).....	8

STATUTES INVOLVED

37 Stat. 670, as amended, 18 U. S. C. Section 409 (1946).....	4
31 Stat. 1322, 22 D. C. Code Section 2901.....	5

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 9807

WILLIAM S. HODGES, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA*

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

This is an appeal from a conviction and sentence on both counts of a two-count indictment. Count one of this indictment charged theft from an interstate shipment (U. S. C. Title 18, Sec. 409) and count two charged robbery (D. C. Code, Title 22, Sec. 2901 (1940)).

Three codefendants, namely, William H. Whitehair, Melvin T. Eckloff, and William J. Stewart, were jointly indicted with appellant (R. 222). Each of the three codefendants entered a plea of guilty to the first count of the indictment. Appellant entered a plea of not guilty and was tried by a jury which rendered a verdict of guilty on both counts (R. 227). Appellant was sentenced to imprisonment for a period of from two to six years on the first count and one to three years on the second count; said sentences to run consecutively (R. 231).

The following events gave rise to the judgment of conviction from which this appeal is taken. Roscoe Greiss and one of his employees, Robert Powers, came to the District of Columbia on October 28, 1947, en route to Baltimore, Maryland, to get a load of whiskey to be carried to North Carolina (R. 3-4). In Washington, they met William H. Whitehair and

William J. Stewart (R. 4). Mr. Greiss made arrangements with Whitehair and Stewart to haul the whiskey from Baltimore to North Carolina (R. 4). Whitehair, Greiss, and Powers then went to Baltimore and purchased 125 cases of whiskey—valued at approximately \$4,617.00—which was loaded into Whitehair's truck. Whitehair drove the truck containing the whiskey to Newbill's Truck Terminal in Washington, D. C. (R. 5). Whitehair then informed Mr. Greiss that his truck was broken and would be unable to haul the whiskey to North Carolina (R. 9). For this reason, Whitehair, Stewart, Greiss, and Powers unloaded the 125 cases of whiskey and placed this whiskey on another trailer. Whitehair said that he would obtain a tractor to pull the trailer load of whiskey to North Carolina the next morning.

The trailer on which the whiskey was placed had two doors, both of which were padlocked and the keys retained by Mr. Greiss. Mr. Greiss drove his automobile, a Cadillac coupe, up along the left side of the trailer, three inches from the side door. This took place at about seven-thirty in the evening. Mr. Powers left the truck terminal to get something to eat. Stewart and Whitehair left very shortly thereafter and indicated that they would return at seven o'clock in the morning. Mr. Greiss stayed at the truck terminal until about eleven p. m., when Robert Powers returned to watch the whiskey. Mr. Greiss then left the truck terminal.

Mr. Powers testified that after Mr. Greiss left the truck terminal, he, Powers, stayed around the truck terminal to watch the whiskey (R. 78). With this in mind, he decided to stay in Mr. Greiss' automobile so as to be near the whiskey. He fell asleep and was awakened by the smashing of the glass in the door of the automobile, after which he was hit twice on the head with what appeared to be a pistol (R. 79). Powers' ring and his wallet, containing approximately seventy dollars, were then taken by the man who had struck him. Shortly thereafter, codefendant Stewart, whom Powers knew, and a short man, whom the others called "Willie," came up to the car (R. 80). Willie was later identified as the appellant (R. 27, 29-30, 34, 35, 36-37, 39, 112-113). They forced Powers to help remove the 125 cases of whiskey from the

trailer, in which it had been placed in the late afternoon, to another truck (R. 82). Mr. Powers believed that this truck was an International truck with a red body. John McElhaney, an employee of the National Truck Rental Co., testified that on the afternoon of October 28, 1947, he had rented an International truck with a red body to James Stewart (R. 65). Powers was then forced into the International truck, which was driven to the back of the Fat Boy Restaurant, located about two blocks from the trucking terminal. At this point appellant got out of the truck and into an old gray automobile and drove away (R. 85). Powers testified that the truck was then driven by Stewart to a place in northeast Washington where the same gray automobile passed it and stopped (R. 85). In the truck at this time, were Stewart, Powers, and the other man whom Whitehair identified as Eckloff (R. 26-27, 30-31). The truck stopped also and appellant got out of the automobile and into the truck. Codefendant Whitehair, whom Powers knew, also got out of the automobile and told the other men he would meet them later in Virginia.

This International truck was then driven over to Virginia where Stewart and Eckloff left the truck (R. 87). Appellant remained in the truck with Powers until an Arlington Police Officer approached the truck, at which time appellant got out of the truck and ran away (R. 87).

Codefendant Whitehair testified that after bringing the whiskey from Baltimore, he and codefendant Stewart went to a tavern on Second Street, Northeast, near Union Station. At this tavern they met Eckloff with whom they discussed taking Mr. Greiss' whiskey (R. 26-27). Eckloff said that someone else would be needed to help take the whiskey off the truck and suggested that he would get someone to assist them (R. 28). Eckloff then left the tavern and returned about eleven p. m. with the appellant (R. 27-29). Eckloff, Stewart, Whitehair, and the appellant then returned to Newbill's Truck Terminal (R. 30). At the truck terminal, Stewart gave Whitehair a bottle of whiskey to be given to Newbill's watchman to keep him occupied while the others were taking the whiskey (R. 31). When the truck, which Stewart had rented, left the truck terminal, Whitehair left the watchman's station and

walked down the street (R. 32-34). Shortly thereafter, appellant drove up in an old gray car and stopped for Whitehair (R. 34). Whitehair entered the car and they followed the truck to Third and Maryland Avenue Northeast (R. 36). The car began to heat up, so appellant and Whitehair abandoned it (R. 37). Appellant left the car and joined Stewart, Eckloff, and Powers in the truck which was carrying the whiskey, and continued on to Virginia. After abandoning the car with appellant, Whitehair went into a filling station to phone the person to whom he was intending to sell this whiskey (R. 37). Sometime later, Whitehair went on to the Alexandria Hotel in Virginia where he was to meet the others (R. 36, 39). When Whitehair reached the rendezvous point he discovered that the police had already retaken the whiskey (R. 38).

James Robert Jones, a taxi driver, testified that appellant was customarily known by the nickname "Willie" (R. 113). Jones also testified that on the morning following the crime, October 29, 1947, Eckloff and appellant entered his cab and Eckloff told him, in the presence of appellant, not to talk if he, Jones, were questioned by the F. B. I. concerning any whiskey (R. 113-114).

The defense called codefendant Stewart who would neither affirm nor deny that appellant was one of the participants.

The appellant did not take the stand.

STATUTES INVOLVED

Act of February 13, 1913, 37 Stat. 670, as amended, 18 U. S. C. (1946).

SECTION 409. LARCENY, ETC., OF GOODS IN INTERSTATE OR FOREIGN COMMERCE; PENALTY.

(a) Whoever shall—

(1) unlawfully break the seal or lock of or enter any railroad car, vessel, aircraft, motortruck, wagon, or other vehicle containing interstate or foreign shipments of freight or express, with intent to commit larceny therein; or

(2) embezzle, steal, or unlawfully take, carry away, or conceal, or by fraud or deception obtain from any—

(i) railroad car, motortruck, wagon, or other vehicle,

§ 409 (c) The term "interstate or foreign commerce" shall include transportation from one State, Territory, or the District of Columbia to another State, Territory, or the District of Columbia, or to a foreign country, or from a foreign country to any State, Territory, or the District of Columbia.

§ 409 (e) The term "motortruck" shall mean truck, truck-tractor, trailer, semitrailer, automobile, bus or other vehicle used upon or designed for use upon roads, highways, or streets.

§ 409 (g) Prosecutions under this section may be instituted in any district wherein the crime shall have been committed, or in which the offender may have taken, removed, brought or been in possession of said money, freight, express, baggage, goods, or property.

Act of March 3, 1901, 31 Stat. 1322.

22 D. C. Code Section 2901. ROBBERY.

Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

SUMMARY OF ARGUMENT

I

Before the trial of this case began, one of the other defendants changed his plea from not guilty to guilty. The Court's action in permitting this change of plea is alleged, by appellant, to have constituted error. He does not show prejudice to appellant. The plea was received in the absence of the jury. No exception was taken at the time. An application by a co-defendant to change his plea is addressed to the sound discretion of the trial court and the action of that court will not be disturbed unless there is shown an abuse of discretion.

II

Appellant brought a motion for a new trial in which he urged, as he urges here, that the verdict of the jury was contrary to the weight of the evidence. This point is the only ground in the motion for new trial not abandoned on appeal. There was substantial evidence of his guilt. The motion for new trial was denied. The weight of the evidence is for the jury. The only question for this Court is whether there is substantial evidence of guilt to sustain the verdict of the jury.

The refusal to grant a new trial is within the discretion of the trial court. Its ruling will not be disturbed except in a case of a manifest abuse of discretion.

ARGUMENT

I

An Application by a Codefendant to Change his Plea is Addressed to the Sound Discretion of the Court and the Action of the Court will not be Disturbed Unless there is Shown an Abuse of Discretion

Appellant contends that the action of the trial court in permitting the defendant Stewart to change his plea from not guilty to guilty in the presence of the jury was sufficient error to justify granting a new trial. Appellant's contention is not borne out by either the law or the facts of this case. This Court in *Tomlinson v. United States*¹ stated the law as follows:

An application by a defendant to change his plea is addressed to the sound discretion of the court, and the action of the court will not be disturbed, unless there has been an abuse of that discretion. Assuming in the present case that Bass' change of plea was made in the presence of the jury, no abuse of discretion was shown upon the part of the court below. *Brown v. United States*, 56 App. D. C. 326, 13 F. 2d 298.

Other cases to the same effect as this court's ruling in the Tomlinson case are set forth below.²

¹ 68 App. D. C. 106, 93 F. 2d 652 (1937).

² *Callahan v. United States*, 35 F. 2d 633 (C. C. A. 10th, 1929); *Millard v. United States*, 148 F. 2d 154 (C. C. A. 5th, 1945), cert. denied 325 U. S. 885; *Calbeek v. United States*, 10 F. 2d 401 (C. C. A. 7th, 1925), cert. denied 271 U. S. 662.

Appellant's contention is not borne out by the facts. The record clearly shows that Stewart's plea was not taken in the presence of the jury. Twelve prospective jurors had been called and placed in the jury box. Stewart indicated to his attorney, Mr. Nathan, that he wished to change his plea. Mr. Nathan communicated this information to Mr. Conliff, the prosecuting attorney, in a whispered conference at the counsel table. Whereupon, a request to approach the bench was made and granted (R. 248). The Judge, upon learning that Stewart wished to change his plea, had the entire jury panel sent from the room (R. 249-250). After the jury left the court room, Stewart was allowed to change his plea. The jury was then brought back into the court room and the trial of the case against the appellant was begun (R. 254). When Stewart's plea was taken the case had not been identified for the jury (R. 250). The plea was not taken in the presence of the jury nor did the jury hear any conversation relating to it.

Furthermore, had this plea been taken in the presence of the jury it could not have prejudiced appellant's rights. Stewart was called as a witness by the appellant. It was brought out on cross-examination that he had been one of the perpetrators of the crime and had pleaded guilty to stealing the whiskey (R. 170). It is therefore submitted that the trial court did not abuse its discretion in granting Stewart the right to change his plea.

II

There was Substantial Evidence to Sustain the Verdict of the Jury

Appellant contends that the verdict of the jury was against the weight of the evidence. This contention was urged by appellant in a motion for a new trial and the court found that there was substantial evidence to support the verdict (R. 215). It is not the function of the appellate court to determine the weight of the evidence. The Supreme Court of the United States stated this rule as follows in *Glasser v. United States*:³

³ 315 U. S. 60, 80 (1942).

It is not for us to weigh the evidence or to determine the credibility of witness. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the government, to support it.

This court stated the same rule in essentially the same language in the case of *Hardeman v. United States*.⁴ Additional cases of this type are set forth in the footnote.⁵

Despite appellant's contentions to the contrary, it is well settled that the testimony of an accomplice need not be corroborated to support a conviction.⁶ The Supreme Court in *Caminetti v. United States*⁷ stated the rule as follows:

In *Holmgren v. United States*, 217 U. S. 509, this court refused to reverse a judgment for failure to give an instruction of this general character, while saying that it was the better practice for courts to caution juries against too much reliance upon the testimony of accomplices and to require corroborating testimony before giving credence to such evidence. While this is so, there is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them. 1 Bishop, Criminal Procedure 2d ed. § 1081, and cases cited in the note.

The Seventh Circuit, disposing of a contention similar to that of the appellant, made the following statement:⁸

Accomplice.—We may dismiss without elaboration, the contention that the evidence in this case came

⁴ 82 U. S. App. D. C. 194, 163 F. 2d 21 (1947).

⁵ *Curley v. United States*, 81 U. S. App. D. C. 389, 160 F. 2d 229 (1947), 331 U. S. 837; *United States v. Bender*, 60 F. 2d 56 (C. C. A. 2d 1932), cert. denied, sub. nom.; *Posner v. United States*, 287 U. S. 598; also see *Sipe v. United States*, 80 U. S. App. D. C. 194, 150 F. 2d 984 (1945), 326 U. S. 788.

⁶ *Egan v. United States*, 52 App. D. C. 384, 287 Fed. 958 (1923); *United States v. Moran*, 151 F. 2d 661, 662 (C. C. A. 2d 1945); *United States v. Gallo*, 123 F. 2d 229, 230-231 (C. C. A. 2d 1941); *Hall v. United States*, 109 F. 2d 976, 982 (C. C. A. 10th 1940).

⁷ 242 U. S. 470, 495 (1917).

⁸ *United States v. Riedel*, 126 F. 2d 81, 82 (C. C. A. 7th 1942).

largely from the lips of an accomplice. Such evidence, under innumerable decisions of the Federal Court, is sufficient, even standing alone, to support a conviction. *Heitler v. United States*, 7 Cir., 244 F. 140.

The Seventh Circuit has also ruled that the uncorroborated testimony of an accomplice even though a confirmed criminal, is sufficient to support a conviction.*

Moreover, there is not involved in this case the uncorroborated testimony of an accomplice. Whitehair, the co-defendant, did identify appellant for the Federal Bureau of Investigation in New York where Whitehair voluntarily surrendered. He also testified that appellant had been in the tavern with him where they were discussing taking the whiskey and that appellant accompanied him in the car. He testified further, that appellant had driven the automobile and had picked him up after the whiskey had been stolen. When they abandoned the automobile, appellant got into the truck with the other men who had taken the whiskey.

Robert Powers, although he could not identify the appellant, was able to testify as to appellant's size and height. Powers testified that the short man who helped steal the whiskey was about five-feet, four-inches and that he, Powers, was about five-feet, six-inches. Appellant's attorney then had the two stand back to back so that the jury could see the difference in their height (R. 93). Although these men were of the respective heights indicated by Powers, it is not clearly indicated at this point in the record. It is shown by the comments of the court during the proceedings on appellant's motion for a new trial. On page 215 of the record, the court said:

The identification in this case was as perfect as I have ever seen, identification by the size of the man, not only the size in inches but an actual demonstration before the jury. When they stood there, this man found himself right in a position which conformed with the identification of the size of the man.

* *Cherry v. United States*, 78 F. 2d 334, 335 (C. C. A. 7th 1935).

Powers testified that this short man was called "Willie" by the others. He also testified that "Willie" and Whitehair aban-

doned the automobile in northeast Washington and "Willie" joined them in the truck which continued to Virginia.

James Robert Jones testified that appellant was normally known by the nickname "Willie." Jones also testified that Eckloff, in the presence of the appellant, told him, Jones, to say nothing to the Federal Bureau of Investigation about the whiskey. It was also shown by Jones's testimony that Eckloff and the appellant were good friends and often together. It would be normal, therefore, for Eckloff to get his friend to help them. It will be recalled that Eckloff entered a plea of guilty to the indictment for stealing the whiskey.

Even under the strictest rules of corroboration, it is never required that an accomplice's testimony be corroborated as to each and every fact. All that is required is that the other testimony has to show that the accomplice is telling the truth. In this case, the testimony of the various witnesses fitted into the overall picture like a finely meshed gear. There was substantial evidence of guilt and the verdict of the jury must be upheld.

Appellant contends that the court refused to permit the appellant to take the witness stand. This is not borne out by the record. At page 174 of the record Mr. Saul, appellant's counsel, asked permission to approach the bench. At the bench he said "I am looking for some reason to keep the defendant off the stand." The court informed him that the defendant did not have to take the stand and that the jury would be instructed to that effect. Mr. Saul then closed his case. After this the Government put on one rebuttal witness. At the conclusion of the testimony by this rebuttal witness, Mr. Saul expressed a desire to put the defendant on the stand to rebut certain matters which he believed had been testified to by the Government's rebuttal witness. This desire was communicated to the court in a bench conference. After some discussion Mr. Saul decided that he wished to call the Government's rebuttal witness to the stand. At this point the following conversation took place between the court and Mr. Saul, the attorney for the appellant (R. 182):

The COURT. Do I understand that you want to bring your defendant here?

Mr. SAUL. No.

The COURT. You do not desire to bring your defendant here for anything?

Mr. SAUL. That is correct.

The COURT. Either in chief or in rebuttal?

Mr. SAUL. That is correct.

The COURT. Is that right?

Mr. SAUL. That is correct.

The COURT. For no purpose. But you do want to recall Polkinhorn?

Mr. SAUL. Correct.

The COURT. All right.

It thus appears conclusively that the appellant was not denied the right to take the witness stand, but in fact his present attorney, who represented him at the trial, refused to permit him to take the witness stand.

Appellant alleges that one Government witness, after having completed his testimony, retired to the witness room. While this may be true, there is certainly nothing in the record to show that it actually happened. Appellant brought a motion for a new trial. This objection could have been urged at that time, in which event the trial judge would have passed on whether this did actually happen. However, it is not in the record and is not alleged to have been prejudicial. Therefore, if it did occur, which appears doubtful, it cannot be considered as a basis for a new trial.

It is well-settled law that refusing to grant a new trial is within the discretion of the trial court and its ruling will not be disturbed except in case of a manifest abuse of discretion. This court passed upon an identical contention in the case of *Moder v. United States*,¹⁰ and the court stated:

* * * As to the alleged error of the court in refusing to grant a new trial for the defendants, it may be noted that this was within the discretion of the trial court, and its ruling will not be reversed except in case of a manifest abuse of discretion. Such abuse cannot

¹⁰ 62 App. D. C. 65, 66, 64 F. 2d 703 (1933) cert. denied, sub. nom. *Caparotta v. United States*, 289 U. S. 739.

be claimed in this case. *Moore v. United States*, 150 U. S. 57, 14 S. Ct. 26, 37 L. Ed. 996; *Whelan v. Welch*, 50 App. D. C. 173, 269 F. 689.

'To the same effect is the decision of this Court in *McDonnell v. United States*.¹¹ At the hearing on the motion for new trial it appeared that appellant had no new evidence to introduce. For this reason the court did not abuse its discretion in refusing to grant the motion for a new trial.

CONCLUSION

Wherefore, it is respectfully submitted that the conviction and judgment of the court below should be affirmed.

GEORGE MORRIS FAY,
United States Attorney.

JOHN C. CONLIFF,
Assistant United States Attorney.

JOHN D. LANE,
Assistant United States Attorney.

L. CLARK EWING,
Assistant United States Attorney.

¹¹ 81 U. S. App. D. C. 123, 155 F. 2d 297 (1946).

